

BSG:AML

DJ No. 90-11-3-1620/2



U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

P.O. Box 7611 Telephone: (202) 514-4213

Washington, D.C. 20044-7611 Facsimile: (202) 616-6584

July 22, 2002

VIA HAND DELIVERY (on July 23 or 24, as set forth in the Proof of Service)

Richard Schwartz Schwartz, Manes & Ruby 2900 Carew Tower 441 Vine Street Cincinnati, OH 45202-3090

Re:

United States v. Aeronca, Inc. et al.

Civil Action No. 1:01 CV 00439

Subpoena

Dear Mr. Schwartz:

I have attached a subpoena for documents in the above-referenced matter. It is clear that your law firm does not wish to work cooperatively with the law firm of Shumaker, Loop in responding to the subpoena that that firm served on your firm back on July 10 or 11, 2001. Indeed, I was present when -- and heard clearly that -- Mr. O'Callaghan left you a voice mail indicating that he sought production, on August 12, 2002, of the documents listed in his letter of July 12, 2002 (the letter that narrowed the scope of the subpoena). Nevertheless, in a return voice mail to Mr. O'Callaghan, someone from your firm indicated that on August 12, 2002, your firm would provide only a listing of categories of documents kept by the law firm. Your firm made no commitment to produce responsive documents. Such shenanigans is untoward.

Please provide the documents responsive to the subpoena at the time indicated. I will be in Cincinnati by no later than that time -- and indeed may be there before then -- to receive the documents and to take the deposition of the custodian of your firm's responsive documents. I do not intend to ask questions that seek privileged information. Additional depositions have been scheduled for the week of August 12, 2002, that are dependent upon your firm's timely response to the attached subpoena. Given that Mr. O'Callaghan served his subpoena on your firm on July 10 or 11, your firm will have had plenty of time to comply with these subpoenas.

Sincerely,

Annette M. Lang

Trial Attorney

cc: Skinner Service List

Skinner Service List

Louis E. Tosi (No. 0019756) Michael J. O'Callaghan (No. 0043874) Shumaker, Loop & Kendrick 41 S. High Street, Suite 2210

Columbus, OH 43215

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David E. Northrop (No. 0001804) Porter Wright Morris & Arthur 41 S. High St. Columbus, OH 43215-6194 Counsel for Aeronca, Inc.

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John H. Phillips (No. 0043934)

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Services, Inc., and Richard M. Clarke

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Issued by the UNITED STATES DISTRICT COURT

SOUTHERN

DISTRICT OF

OHIO

DOW	CHEM	ICAL	CO.,	et al
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V.

SUBPOENA IN A CIVIL CASE

A	CME WRECKING CO., INC., et al	CASE NUMBED.	
		CASE NUMBER:	1 01 420
S 2 4 Y	Sustodian of Records on Exhibit A Schwartz, Manes & Ruby 1900 Carew Tower 141 Vine St., Cincinnati, OH 45202-3090 TOU ARE COMMANDED to appear in the United State in the above case.	C-1-97-0307; C-1-97-0308; C	
•	OF TESTIMONY	COURTROO	M
		DÄTE AND 1	гіме
	OU ARE COMMANDED to appear at the place, date, above case.	and time specified below to testify at the ta	sking of a deposition in
PLACE (OF DEPOSITION	DATE AND	ПМЕ 08-13-2002
	OFFICES OF TAFT, STETTINIUS & HOLLISTER VALNUT ST., SUITE 1800, CINCINNATI, OHIO 45202		10:00 a.m.
place, objects	OU ARE COMMANDED to produce and permit inspect date, and time specified below (list documents or s): All documents set forth on Exhibit A; documents for which a ny such documents, however, compliance with F.R.C.P 45(d)(lawful claim of privilege can be made are not r	
PLACE		DATE AND	ЙМЕ 08-13-2002
SAM	E AS ABOVE		10:00 a.m.
PREMIS	OU ARE COMMANDED to permit inspection of the form	ollowing premises at the date and time spe	
design ISSUING USSUING	Any organization not a party to this suit that is subpress, directors, or managing agents, or other persons who dated, the matters on which the person will testify. Feder OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR Line of Justice) OFFICER'S NAME, ADDRESS AND PHONE NUMBER to M. Lang, Trial Attorney, U.S. Dept. of Justice	consent to testify on its behalf, and may set ral Rules of Civil Procedure, 30(b)(6). PLAINTIFF OR DEFENDANT) DATE	forth, for each person

P.O. Box 7611, Ben Franklin Station, Washington, DC 20044-7611 202 514-4213 (See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

This form was electronically produced by Elite Federal Forms, Inc.

PROOF OF SERVICE				
DATE	PLACE			
SERVED				
SERVED ON (PRINT NAME)	MANNER OF SERVICE			
SERVED BY (PRINT NAME)	TITLE			
DE	CCLARATION OF SERVER			
I declare under penalty of perjury under the information contained in the Proof of Service is t	laws of the United States of America that the foregoing rue and correct.			

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

- (1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.
- (2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.
- (B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.
- (3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
 - (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in

person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, ϵ

- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
 - (iv) subjects a person to undue burden.

(B) if a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial. The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without unduhardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

- (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.
- (2) When information subject to a subpoena is withheld on a clair that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT A TO THE SUBPOENA TO SCHWARTZ, MANES & RUBY

INSTRUCTIONS

- A. In the definition of "Clarke Entities":
- 1. The plural of any word shall include the singular and the singular shall include the plural;
- 2. The possessive of any word shall include the non-possessive and the non-possessive of any word shall include the possessive;
- 3. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to made the definition inclusive rather than exclusive; and
- 4. A sole proprietorship (which does not include the words "Co." or "Inc.") shall include a corporation and a corporation shall include a sole proprietorship(s).
- B. <u>General</u>. As respondent is aware, plaintiff's subpoena in this matter relates to discovery with respect to issues of successor liability; therefore, plaintiff is not certain which Clarke Entities were incorporated and which were not. It is the intent of instruction No. 4 to ensure production of documents relating to any possible predecessors or successors to the businesses that were and are located at 2040 E. Kemper Rd, Sharonville, Ohio; 9740 Cincinnati-Dayton Road, West Chester, Ohio; and 9300 Cincinnati-Dayton Road, West Chester, Ohio.
- C. <u>Relevant Time Frame</u>. With the exception of Document Request Nos. 16, 17, and 23, the relevant time frame is any documents created or dated between January 1955, and December 31, 1991.
- D. <u>Privilege as Applied to Document Production</u>. If objection is made to producing any document, or any portion thereof, or to disclosing any information contained therein, in response to any production request on the basis of any claim of privilege, respondent is requested to specify in writing the nature of such information and documents, and the nature of the privilege claimed, so that the Court may rule on the propriety of the objection. In the case of documents, respondent should state:
 - i. the title of the document;
 - ii. the nature of the document (e.g., interoffice memorandum, correspondence, report);
 - iii. the author or sender;
 - iv. the addressee:
 - v. the date of the document;
 - vi. the name of each person to whom the original or a copy was shown

or circulated;

vii. the names appearing of any circulation list relating to the

document;

viii. the basis on which privilege is claimed; and

ix. a summary statement of the subject matter of the document in

sufficient detail to permit the court to rule on the propriety of the

objection.

E. <u>In the Document Requests:</u>

- 1. The plural of any word shall include the singular and the singular shall include the plural;
- 2. The possessive of any word shall include the non-possessive and the non-possessive of any word shall include the possessive; and
- 3. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to made the definition inclusive rather than exclusive.
- F. <u>Documents Not Sought</u>: Documents relating to tort claims or workers compensation claims, except for the complaint and the answer; documents relating to collection proceedings, except for the complaint and the answer; and documents relating to employee benefit claims, except for the complaint and the answer.

DEFINITIONS

The "Clarke Entities" shall mean:

Thomas Clarke

Clarke's Complete Collection and Combustion

Clarke's Complete Collection

Clarke's Complete Collection and Incineration

Clarke Sanitary Landfill

Clarke Sanitary Fill

Clarke's Incinerator's, Inc.

Clarke's Services, Inc.

Richard M. Clarke

Martin E. Clarke

Dick Clarke Co.

Dick Clarke Co.

Clarke Container
All Star Container

Dick Clarke Trash Removal

Dick Clarke Trash Removal and Demolition

Clarke, Inc. Clarke Family Trust Clarke Children's Trust

Any other trust in which Thomas Clarke Sr., Richard M. Clarke, or Martin E. Clarke were either trustees or beneficiaries

DOCUMENTS TO BE PRODUCED

- (1) All documents relating to the corporate proceedings of any of the Clarke Entities;
- (2) All documents relating to the creation and formation of any of the Clarke Entities;
- (3) All documents relating to the ownership of any of the Clarke Entities, including all documents relating to any changes of the ownership and the reasons for any such changes;
- (4) All documents relating to the identities and functions of the officers and directors of any of the Clarke Entities, including all documents relating to any changes in the identities of the officers and directors and the reasons for such change;
- (5) All documents relating to the business purpose(s) of any of the Clarke Entities, including all documents relating to any changes in such purpose;
- (6) All documents identifying the employees of any of the Clarke Entities (a list of such employees would be a suitable substitute), including all documents relating to the dates of employment and the reasons for any changes in employment status;
- (7) All documents identifying the assets of any of the Clarke Entities, including all documents relating to changes in the assets;
- (8) All documents identifying the liabilities of any of the Clarke Entities, including all documents relating to changes in the liabilities;
- (9) All tax returns of the Clarke Entities;
- (10) All financial returns of the Clarke Entities;
- (11) All records relating to any transactions between the Clarke Entities and any financial institution;
- (12) All Trust Agreements relating to the Clarke Entities;
- (13) All documents relating to the transaction in which the Clarke company or

companies that operated out of 2040 East Kemper Road in the 1970s was split up into, at a minimum, a company owned and/or operated by Richard M. Clarke on Cincinnati-Dayton Road and another company that remained at 2040 East Kemper Road. This "split up" occurred in the late 1970s or early 1980's. This transaction is sometimes referred to as one in which Richard M. Clarke bought his father's company;

- (14) All documents relating to the sale of any of the Clarke Entities to BFI of Ohio;
- (15) All documents relating to the sale of any of the Clarke Entities to Mid-American Waste Systems;
- (16) The records of the corporate proceedings of Clarke, Inc. from the time of its incorporation to the present;
- (17) All documents that refer or relate to the existence of Clarke's Services, Inc. at any time after dissolution papers for that corporation were filed to the present;
- (18) The complaint and answers in all actions filed by or against any of the Clarke Entities;
- (19) All documents relating to any transfers among any of the Clarke Entities of any liabilities or assets.
- (20) All documents identifying the customers of any of the Clarke Entities and the timeframes when the customers were served by any of the Clarke Entities, including documents that identify any reasons for the acquisition or loss of any customers.
- (21) Copies of all stock certificates of any of the Clarke Entities.
- (22) Documents identifying any lawyers who represented any of the Clarke Entities, the identity of which of the Clarke Entities that the lawyer(s) represented, and the timeframe(s) of the representation.
- (23) From 1955 to the present, documents relating to the ownership of the properties at 2040 E. Kemper Rd, Sharonville, Ohio; 9740 Cincinnati-Dayton Road, West Chester, Ohio; and 9300 Cincinnati-Dayton Road, West Chester, Ohio.
- (24) A list of the categories of documents kept in the files of Schwartz, Manes & Ruby relating to the Clarke Entities.